

INCOTERMS® 2010: CODIFIED MERCANTILE CUSTOM OR STANDARD CONTRACT TERMS?

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1 Introduction

Trade terms represent commercial customs and usages¹ that have developed over centuries in a particular trade or region.² They function as contractual terms which indicate in abbreviated form the seller and buyer's respective delivery obligations, and at the same time they allocate the risk and costs connected to delivery.³ When trade terms are understood uniformly they fulfil a harmonisation function in international trade. Because merchants know what is expected from them, trade terms provide legal certainty, which means less disputes and lower transaction costs. However, studies have found that the understanding and interpretation of trade terms tend to differ from one country to the other or from one commercial sector to the next.⁴ In an effort to standardise the interpretation of trade term content, the International Chamber of Commerce ("ICC") formulated INCOTERMS®. The first edition was published in 1936 and thereafter revised in 1953, 1967, 1976, 1980, 1990, 2000 and 2010. The rules are accepted by governments, scholars, merchants and legal practitioners worldwide⁵ and have been endorsed by the United

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¹ See R Goode "Usage and its Reception in Transnational Commercial Law" (1997) 46 *Int'l & Comp LQ* 1 n 20, who refers to the "linguistic ambiguity" of the terms "usage" and "custom" Traditionally, a distinction was made between these terms They can, however, also be used interchangeably and it seems that this is the prevailing opinion "Custom" or "usage" refers to a practice that is used over a geographically wide area by a considerable number of merchants in a particular trade to the extent that it is well-known and thus expected to be adhered to by merchants engaged in that trade

² DM Sassoon *C.I.F. and F.O.B Contracts* 4 ed (1995) vii; KP Berger *The Creeping Codification of the Lex Mercatoria* (1999) 105

³ Trade terms have a limited scope and application They do not regulate aspects such as breach of contract, exemption from liability and passing of property, although they might influence them indirectly These aspects should still be decided by the governing law of the contract or by party agreement The same applies to INCOTERMS® See the *Introduction to the ICC Incoterms® 2010* (2010) 6 para 4

⁴ WV Roth & WV Roth "INCOTERMS: Facilitating Trade in the Asian Pacific" (1987) 18 *U Pa J Int'l L* 731 732-733; JM Klotz & JR Barrett *International Sales Agreements: An Annotated Drafting and Negotiating Guide* (1998) 72-73

⁵ L Graffi "Remarks on Trade Usages and Business Practices in International Sales Law" (2011) 29 *JL & Com* 273 283

Nations Commission on Trade Law (“UNCITRAL”) which has promoted their use internationally.⁶

Regular revisions ensure that INCOTERMS® keep up with developments in international mercantile practice and make them more user friendly. However, it is not always easy to find consistent commercial practice which applies across different trades and regions. For example, practices in the loading of ships under the FOB (“free on board”) term and the unloading from ships under CFR (“cost and freight”) and CIF (“cost, insurance and freight”) terms tend to differ from place to place and from one branch of trade to the other.⁷ Because commercial practice is not the same everywhere, INCOTERMS® can merely reflect the most common or dominant practice at a given point in time. It is the task of the ICC to create rules that are appropriate in as many countries and in as many situations as possible and to remain “country neutral”. To this end, the rules are in some respects abstract and are sometimes criticised as not providing sufficient guidance to traders. According to the drafters this is “the consequence of capturing in one sentence or in a paragraph the variations in practice that take place in different regions”.⁸

The ICC’s *modus operandi* for revising INCOTERMS® is to determine current commercial practices through a consultation process which involves national committees representing various interest groups and stakeholders connected to international business. The object of the first editions, 1936 and 1953, was to provide standardised definitions of the most commonly used trade terms without adding any theoretical improvements.⁹ Mercantile practice as expressed by INCOTERMS® evolved over centuries and would not have withstood the test of time if they had not been effective and efficient. This obviated the need for any improvements. The ICC’s main aim was to achieve uniformity by standardising international mercantile customs and practices. Once that could be achieved, “improvements would be gradually accepted”.¹⁰

The aim of this article is to discuss the legal nature and status of INCOTERMS® in the context of the latest revision of the rules. INCOTERMS® are formulated by an international agency, the ICC, to standardise international commercial practices and usages. Generally INCOTERMS® operate as contract terms on which the parties have to agree. But are they capable of operating independent of party agreement as autonomous law? And to what extent does the ICC’s revision methodology affect the legal character of INCOTERMS® as “a source of codified trade usages”?¹¹ A well-known commentator has recently stated that in the context of the latest revision “[i]t must ... be concluded that

⁶ United Nations Report of the United Nations Commission on International Trade Law 45th Session (25 June-6 July 2012) Official Records of the General Assembly 67th Session Supplement No 15 UN Doc A/67/17 para 144

⁷ J Ramberg *Guide to INCOTERMS 2000* (1999) 14

⁸ J Ramberg “Why Revise INCOTERMS?” in J Ramberg, P Rapatout, F Reynolds & C Debattista *INCOTERMS 2000: A Forum of Experts* (2000) 8 8

⁹ *Introduction to the ICC INCOTERMS 1953* (1953) 6

¹⁰ 6

¹¹ Graffi (2011) *JL & Com* 283

Incoterms still reflect custom of the trade but, in some respects, amount to no more than a standard form contract”¹²

The investigation commences by contextualising the revision process that led to INCOTERMS® 2010. This sets the scene for discussing the legal nature of INCOTERMS® with reference to the viewpoints of scholars, the courts and the revision methodology of the ICC.

2 The 2010 revision

2.1 General background

The 2010 revision was the result of a two-and-a-half year process of research, surveys and revisions. In 2006, the ICC Secretariat circulated a questionnaire to the ICC National Committees and several ICC Commissions, enquiring whether there was any market demand for a revision and, if so, which provisions were in need of revision. Two thousand comments were received from 130 countries represented in the ICC.¹³

The replies received indicated that there was no market need for a full revision. However, some of the comments indicated the need for clarification on some points. The request was that the revision should address, *inter alia*, the clarification of terms that are often misunderstood and misused, such as the traditional FOB and CIF terms, the removal of terms that are not frequently used and the addition of terms to reflect current commercial practices. It was suggested that proposals not implemented by the 2000 revision, and which might now be more practical, should be implemented. The increased use of the Internet as a means of doing business raised the question as to whether a new trade term for electronic contracts was required. In addition, security requirements had brought changes to contracts with traders and a major revision was required of the seller-buyer cargo security obligations.¹⁴

Another concern raised was the issue of costs, *ad hoc* surcharges and terminal handling charges (“THC”s).¹⁵ Shippers identified key weaknesses

¹² J Ramberg “INCOTERMS® 2010” (2010) 29 *Penn St Int’l L Rev* 415 423

¹³ J Baron “New Decade, New Update: Incoterms 2010 Picks Up where Incoterms 2000 Left Off” (2011) *Business Credit* 20 21 On the procedure for the present revision, see F Reynolds “Export ABC’s: INCOTERMS Revision” (15-01-2008) *The Journal of Commerce* <<http://www.joc.com/export-abcs-incoterms-revision>> (accessed 14-03-2012)

¹⁴ See ICC Belgium “Enquête over de toepassing en de herziening van INCOTERMS 2000” *ICC Belgium* <<http://www.iccwbo.be/index.html?file=142>> (accessed 14-03-2012); Wizard “The Future of Incoterms” (31-03-2008) *Boskage Trade News* <<http://boskagetradenews.blogspot.com/2008/03/future-of-incoterms.html>> (accessed 14-03-2012); F Reynolds “Export ABC’s: INCOTERMS 2010?” (05-07-2007) *The Journal of Commerce* <<http://www.joc.com/export-abcs-incoterms-2010>> (accessed 14-03-2012); TO Lee “Comments on Incoterms First Draft” *T.O. Lee Consultants Ltd* <http://www.tolee.com/html/incoterms_3k_draft1.htm> (accessed 14-03-2012); TO Lee “EXW Delivered to serve China Trade Practice” *T.O. Lee Consultants Ltd* <http://www.tolee.com/html/exw_delivered.htm> (accessed 14-03-2012)

¹⁵ THCs refer to all charges related to the handling of cargo at the terminal of loading or discharging operated by or on behalf of the carrier THCs may also include the costs of receiving a container at the container terminal, storing it and delivering it to the ship at the port of loading or receiving it from the ship at the discharge port, storing and delivering it to the consignee These charges may be part of the freight agreed upon between the shipper and carrier or the carrier may choose to bill all or part of the THCs separately Whether THCs are entirely, partly or not at all part of the freight differ according to the transport mode used Even within one transport mode regional differences or differences between individual terminals may exist See B van de Veire “Problems Related to the FCA Term” in C Debattista (ed) *INCOTERMS in Practice* (1995) 120

in the 2000 edition of the INCOTERMS® regarding the FOB and CFR terms. Ambiguities enabled service providers, who operate as the link between buyers and sellers, to interpret cost liability and cargo responsibility incorrectly when containerised goods are loaded in different circumstances. Shippers often pay undue charges to lines and logistics providers, while the buyers who nominate these carriers are unknowingly paying the same costs as a charge hidden in the freight. Shippers all agreed that the critical point of FOB had to be more exclusively defined and that under no circumstances should a party who has physically lost control of the goods remain liable for payment of surcharges and THCs. Shippers furthermore agreed that the ship's rail as the critical point for FOB contracts is more suitable for break bulk cargo. However, they pointed out that FOB contracts still play a role in container transport, especially in small ports where containers are still loaded on a hook-to-hook basis. Moreover, many buyers continue to shy away from using terms such as FCA ("free carrier") or FAS ("free alongside ship") because they feel more secure in using the well-known FOB¹⁶ or CFR terms.

It is against this background that the changes brought about by the 2010 revision will now be discussed.

2.2 Changes introduced by the latest revision

The latest revision, INCOTERMS® 2010, came into force on 1 January 2011 and will apply to all transactions concluded after this date, unless otherwise agreed. This edition indicates that INCOTERMS® are no longer to be referred to as "terms" but as "rules".¹⁷ It has been said that this will add additional strength to the INCOTERMS® so that they can operate as a dominant standard.¹⁸

INCOTERMS® 2010 introduce a new subtitle indicating a change in focus from rules aimed at promoting uniform interpretation¹⁹ to rules advising merchants on the most appropriate terms to be used in a given situation.²⁰ Furthermore, the subtitle indicates that the rules can be used for international as well as domestic transactions. Since there used to be some misunderstanding in this regard, this change facilitates a better understanding of the contexts in which the rules can be applied. The recognition of their domestic application is a direct consequence of what was happening in practice. Trade blocs, such as the European Union, have also reduced the importance that border formalities play in trade between different countries. A further incentive for the change was the increased use of INCOTERMS® in domestic trade within the United

¹⁶ Another reason why buyers still insist on using the FOB term instead of FCA is because the buyer does not want to pay for the transport handling costs. See Ramberg *Guide to INCOTERMS 2000* 33.

¹⁷ ICC *INCOTERMS® 2010* 125.

¹⁸ R Bergami "Incoterms 2010: Comments on the New Revision of Delivery Terms" (2011) 15 *Vindobona Journal of International Commercial Law and Arbitration* 160.

¹⁹ The 2000 version was titled the "ICC Official Rules for the Interpretation of Trade Terms". See ICC *INCOTERMS 2000* (1999).

²⁰ So-called "ICC Rules For the Use of Domestic and International Trade Terms". See ICC *INCOTERMS® 2010*. See also the *Introduction to the ICC Incoterms® 2010* 8.

States of America, especially after the definitions for shipment and delivery terms were deleted from the Uniform Commercial Code (“UCC”).²¹

Editorial changes which assist the understanding of INCOTERMS® are part of every revision. When compared to INCOTERMS® 2000, the 2010 rules underwent a major technical and stylistic revamp. In the majority of cases, these changes do not affect the meaning or definition of the rules but are aimed at providing a more user friendly text. Clarity promotes a better understanding of the content and therefore promotes legal certainty, which has been one of the main goals of the ICC since the first edition of INCOTERMS® was published in 1936.

A major change is the re-classification of the rules into two main categories or classes. This change is aimed at assisting the user in choosing the most appropriate INCOTERMS® rule. Since the 1990 revision INCOTERMS® have been presented in four groups, namely the E, F, C and D groups, named after the first letter of the abbreviation. The 2010 revision does away with these groups and divides the trade terms into two main categories, namely any mode of transport rules (EXW (“ex works”), FCA, CPT (“carriage paid to”), CIP (“carriage and insurance paid to”), DAT (“delivered at terminal”), DAP (“delivered at place”), DDP (“delivered at paid”))²² followed by rules aimed at sea and inland waterway transport (FAS, FOB, CFR, CIF). The manner in which the rules are presented means that the rules applicable to any mode of transport precede the traditional maritime terms. This way a merchant is subtly guided to use the rules falling under the “any mode” category as rules of first preference, even in situations where the traditional maritime terms, FOB and CIF, would traditionally be used.²³

Most of the information previously contained in the comprehensive Introduction is now included in the Guidance Notes preceding each rule, resulting in greater user friendliness. However, note should be taken that the Introduction and Guidance Notes are not part of the official rules “but are intended to help the user accurately and efficiently steer the appropriate INCOTERMS® rule for a particular transaction”.²⁴ The use of a rule in circumstances that are not appropriate to its use will thus not give rise to any legal consequences but will merely amount to inefficient results. The inappropriate use of the FOB INCOTERMS® rule may serve as an example. The ship’s rail as the delivery point under FOB, CIF and CFR has always been criticised for its arbitrary results.²⁵ Despite these criticisms, the 2000 revision left the ship’s rail as the dividing point for costs and risks. At that time it was argued that any change to this point will give rise to uncertainties. The 2010 version omits all references to the ship’s rail as the point of delivery. Instead, it states that the goods are delivered when they are “on board” the vessel as this point is closer to “modern commercial reality”.²⁶

²¹ ICC INCOTERMS® 2010 8 para 3; Ramberg (2010) *Penn St Int’l L Rev* 418, 420

²² These rules can also be used in the case of maritime transport

²³ J Ramberg *ICC Guide to Incoterms® 2010* (2010) 10

²⁴ ICC INCOTERMS® 2010 8 para 4

²⁵ Cf *Pyrene Co Ltd v Scindia Navigation Co Ltd* [1954] 2 QB 402 419

²⁶ ICC INCOTERMS® 2010 7 para 2

Regardless of the changes in transportation techniques, merchants still continue to use FOB, even where goods are not directly loaded onto the ship on arrival at the port of shipment as it used to be in the eighteenth and nineteenth centuries. In the majority of cases manufactured goods are transported in a container, in which instance the FOB and CIF INCOTERMS® are not the appropriate rules to use as they reflect customs and usages which were prevalent in a time when transportation methods differed from those used today.²⁷ The inappropriate use of the FOB term saddles the seller with the risk of damage to the goods subsequent to handing them over to the shipping or container yard until they are on board the ship.²⁸ In the case of containerised goods, it is often impossible to ascertain whether damage to the goods occurred before or after they had passed the ship's rail. This results in the buyer effectively having to carry the risk for the entire duration of their transportation. This is in stark contrast to international policy considerations which dictate that the buyer should not carry the risk of the goods during any period that they are not under his control.²⁹ FOB is only appropriate where the goods are to be delivered directly to or into the ship, as in the case of commodities, but should not be used where the goods are handed over to a carrier for subsequent entry into the ship. The Guidance Note to the FOB INCOTERMS® 2010 rule accordingly cautions against such use and suggests that FCA should be used instead since it indicates the actual place where the goods are to be handed over to the carrier. The same considerations apply to the CIF and CFR INCOTERMS®. Here CPT or CIP should be used instead.

Another aspect that had a significant impact on the 2010 revision was the developments concerning trade terms in the United States of America. On a global scale, the United States is one of the major trading nations doing business internationally. Historically, however, the Americans have never been a supporter of INCOTERMS®; mainly because they had their own set of codified definitions for shipment and delivery terms in the form of the 1941 American Foreign Trade Terms Definitions, followed in 1952 by statutory definitions contained in article 2 of the UCC. Over time, the American Foreign Trade Terms Definitions became outdated, and in 2004, the UCC definitions were abolished and deleted from the Code. One of the reasons canvassed for this move was that the UCC definitions could not keep up with developments in international trade and that the ICC INCOTERMS® would be a far better alternative to that end.³⁰ After they had been endorsed by UNCITRAL in 1982, the international acceptance of INCOTERMS® increased significantly.

²⁷ Bergami (2011) *Vindobona Journal of International Commercial Law and Arbitration* 167-168. Also see B Zeller "Is the Ship's Rail Really Significant?" (2005) 2 *NJCL* 1

²⁸ J Ramberg "CISG and INCOTERMS 2000 in Connection with International Commercial Transactions" in CB Andersen & UG Schroeter (eds) *Sharing International Commercial Law across National Boundaries: Festschrift for Albert H Kritzer on the Occasion of his Eightieth Birthday* (2008) 394-395-397

²⁹ In the case of containerised goods, they are normally handed over to the carrier at the carrier's terminal before the arrival of the ship and not over the ship's rail at the moment of loading. In practice, it is almost impossible to ascertain whether damage to containerised goods occurred before or after the goods passed the ship's rail, unless the container itself was damaged

³⁰ L Rusch "Is the Saga of the Uniform Commercial Code Article 2 Revisions Over? A Brief Look at what NCCUSL Finally Approved" (2003) 6 *Del L Rev* 41-61

Consequently, they became more attractive; also to the Americans. Despite the apparent advantages of using INCOTERMS[®], it is not always easy to break with existing habits, especially not where practices and usages have been followed for a long time, as was the case in the USA.

UCC § 2-319 (2001) used to contain three separate definitions for the FOB term, based on different commercial practices that are followed in the United States. “FOB vessel, car or vehicle” refers to the regular understanding of FOB as a shipment term; “FOB place of destination” defines FOB as an arrival contract, while “FOB place of shipment” does not require the seller to load the goods onto the vessel as under the traditional FOB term and its corresponding INCOTERMS[®] rule.³¹ American trade usage also differentiates in its allocation of shipping costs depending on the FOB variant used.³² The term “FOB vessel, car or vehicle”, furthermore, indicates that the UCC definitions do not restrict the use of FOB to waterborne transport. After the 2003 revision have deleted these codified definitions from article 2 UCC, traders in the United States are increasingly forced to make use of INCOTERMS[®] for guidance, especially when doing business internationally. Hence, the latest revision of INCOTERMS[®] had to cater for the commercial and shipping practices of the Americans. To address these needs, DAP and DAT were added to the 2010 rules.³³

The DAP rule means that the seller delivers when the goods are placed at the disposal of the buyer on the arriving means of transport ready for unloading at the named place of destination.³⁴ The seller bears all risks and costs involved in bringing the goods to the named place.³⁵ Costs of unloading are for the account of the buyer, unless the contract of carriage provides that the seller has to take responsibility for these charges.³⁶ Because this term can be used for all modes of transportation, the so-called “arriving means of transport” may also be a vessel and the place of destination may be a port.³⁷ If the seller is to make the goods available to the buyer unloaded from the arriving means of transport, the DAT INCOTERMS[®] 2010 rule should be used. This rule operates similarly to DAP, except that the unloading is to be conducted on the seller’s risk and costs, and at a named terminal.³⁸ The terminal refers to “any place, whether covered or not, such as a quay, warehouse, container yard or

³¹ Ss 2-319(1)(a) and (b) of the UCC (2001); H Gabriel “International Chamber of Commerce INCOTERMS 2000: A Guide to their Terms and Usage” (2001) 5 *Vindobona Journal of International Commercial Law and Arbitration* 41 52

³² Klotz & Barrett *International Sales Agreements* 70-71 See also DE Murray “Risk of Loss of Goods in Transit: A Comparison of the 1990 INCOTERMS with Terms from other Voices” (1991) 23 *U Miami Inter-Am L Rev* 93 105-106 for a discussion of the American case law on FOB variants

³³ Ramberg *ICC Guide to Incoterms*[®] 2010 9; Ramberg (2010) *Penn St Int’l L Rev* 421

³⁴ Art A4

³⁵ Arts A5 and A6

³⁶ Arts A6(b) and B6(b)

³⁷ This term can therefore be used in circumstances where the Incoterms 2000 rules DAF, DES and DDU could be used See ICC *INCOTERMS*[®] 2010 6 para 1

³⁸ Arts A4-A6

road, rail or air cargo terminal”.³⁹ The DAT and DAP rules are appropriate for multimodal transport.

The Introduction to the 2010 rules states that the “new rules make the Incoterms 2000 terms DES and DEQ superfluous”.⁴⁰ Consequently, there was a need for consolidating the D-terms, and DAF (“delivered at frontier”), DES (“delivered ex ship”), DEQ (“delivered ex quay”) and DDU (“delivered duty unpaid”) were deleted. The DAT and DAP INCOTERMS® rules cover all the situations that were previously covered by the four D-terms. The total number of INCOTERMS® now amounts to eleven.

In the context of commodity sales, mercantile practice provides for sales that are conducted whilst the goods are in transit (so-called “string sales”). To facilitate such transactions, article A4 of the FAS, FOB, CFR and CIF rules now states that delivery takes place when the goods are placed on board the nominated vessel or “by procuring the goods so delivered”.⁴¹

To address the security concerns of traders, articles A2/B2 and A10/B10 of every INCOTERMS® 2010 rule allocate obligations to the buyer and the seller to obtain or to render assistance in obtaining security-related clearances.⁴² This is a new obligation introduced by this revision.

Another issue addressed by the 2010 revision is terminal handling costs. Under CPT, CIP, CFR, CIF, DAT, DAP and DDP it is the obligation of the seller to arrange for the carriage of the goods to an agreed destination. The seller covers himself by including the freight costs in the selling price of the goods. In practice, however, the buyer will often be charged with the handling costs of the goods in the port or container terminal prior to shipment. The buyer would like to avoid having been charged for these costs twice. Revised article A6/B6 seeks to allocate these costs clearly to avoid uncertainties.⁴³

Article A8/B8 of the previous edition provided for “an equivalent electronic data interchange (EDI) message” instead of a paper transport document. Because electronic communications are not limited to electronic transport documents, the issue of electronic communication was removed from article 8. Furthermore, there was a need to address the fact that electronic forms of communication are constantly developing. To broaden the general scope and application of electronic communications each INCOTERMS® rule now refers to “an equivalent electronic record or procedure”,⁴⁴ as long as the parties agree to make use of this form of communication or where it is customary to do so. This formulation ensures that there will be no need to revise or adjust

³⁹ *Guidance Note to the DAT INCOTERMS® 2010 rule* See ICC *INCOTERMS® 2010* 53 This rule is closest to the previous DEQ term

⁴⁰ ICC *INCOTERMS® 2010* 6 para 1

⁴¹ 9 para 9

⁴² 9 para 7

⁴³ 9 para 8

⁴⁴ ICC *INCOTERMS® 2010* arts A1/B1 The ICC *INCOTERMS® 2010* 11 define an electronic record or procedure as “[a] set of information constituted of one or more electronic messages and, where applicable, being functionally equivalent with the corresponding paper documents” This is in line with the “functional equivalent” approach advocated by the UNCITRAL *Model Law on Electronic Commerce* (1996) A/RES/51/162

these provisions of INCOTERMS[®] again if any developments in this field were to take place.

Revisions made to the Institute Cargo Clauses⁴⁵ in 2009, relating to the insurance of goods, have also been noted. Article A3/B3 of the CIF rule acknowledges these changes. The duty to provide information for purposes of insurance was moved from article A10/B10 to A3/B3. In addition, the language was adapted to clarify the parties' obligations in regard to taking out insurance.

3 Legal nature and status of INCOTERMS[®]

3 1 Scholarly opinion and case law

Unless incorporated into the municipal legislation of a country, INCOTERMS[®] do not enjoy the status of a statutory instrument.⁴⁶ Generally, an INCOTERMS[®] rule only applies when incorporated into a contract of sale by agreement.⁴⁷ Once incorporated, the rule functions as a contractual term and hence as part of the governing law of the contract. To that extent the rules can be characterised as standard contract terms.⁴⁸ In the Foreword to the 2010 edition the ICC refers to the rules as “a contract standard”, which supports this notion.⁴⁹ However, INCOTERMS[®] have also been referred to as “code-like” instruments⁵⁰ or “codified trade usages”.⁵¹

Normally the INCOTERMS[®] rules operate through express incorporation.⁵² However, if the parties have a longstanding business relationship and routinely make use of INCOTERMS[®] to define the trade term used in their contracts, INCOTERMS[®] will be applicable on the basis of tacit consensus

⁴⁵ Lloyd's & Institute of London Underwriters *Institute Cargo Clauses* (LMA/IUA) (2009)

⁴⁶ CM Schmitthoff *International Trade Usages* (1987) para 39; CM Schmitthoff “The Law of International Trade” in C-J Cheng (ed) *Clive M Schmitthoff's Select Essays* (1988) 219 224; Gabriel (2001) *Vindobona Journal of International Commercial Law and Arbitration* 41 n 6

⁴⁷ ICC *INCOTERMS 2010*[®] 5 para 1; Bergami (2001) *Vindobona Journal of International Commercial Law and Arbitration* 157, 159; CM Schmitthoff “The Unification or Harmonisation of Law by means of Standard Contracts and General Conditions” (1968) 17 *Int'l Comp LQ* 551 557; ICC International Court of Arbitration case no 7197 of 1992 (CLOUT case no 104) *Pace University* <<http://cisgw3.law.pace.edu/cases/937197i1.html>> (accessed 17-02-2012) and *Unilex* <<http://www.unilex.info/case/cfm?pid=1&do=case&id=37&step=Abstract>> (accessed 17-02-2012); High Arbitration Court (or Presidium of Supreme Arbitration Court) of the Russian Federation: Information Letter 10 (25 December 1996) *Pace University* <<http://cisgw3.law.pace.edu/cases/961225r1.html>> (accessed 17-02-2012); Russian Federation Chamber of Commerce and Industry Arbitration Award no 220/1996 (11 April 1997) *Pace University* <<http://cisgw3.law.pace.edu/cases/970411r1.html>> (accessed 17-02-2012); Russian Federation Chamber of Commerce and Industry Arbitration Award no 27/2001 (24 January 2002) *Pace University* <<http://cisgw3.law.pace.edu/cisg/cases/020124r1.html>> (accessed 17-02-2012); ICC Arbitration case no 7645 of March 1995 – *Crude metal case Pace University* <<http://cisgw3.law.pace.edu/cases/957645i1.html>> (accessed 17-02-2012); Higher Cantonal Court du Valais Switzerland (28 January 2009) *Pace University* <<http://cisgw3.law.pace.edu/cases/090128s1.html>> (accessed 17-02-2012)

⁴⁸ RF Henschel “Creation of Rules in National and International Business Law: A Non-National, Analytical-Synthetic Comparative Method” in CG Andersen & UG Schroeter (eds) *Sharing International Commercial Law across National Boundaries: Festschrift for Albert H Kritzer on the Occasion of his Eightieth Birthday* (2008) 177 179; A Boggiano *International Standard Contracts: The Price of Fairness* (1991) 18; Schmitthoff (1968) *Int'l Comp LQ* 557

⁴⁹ ICC *INCOTERMS 2010*[®] 4

⁵⁰ Berger *Creeping Codification of the Lex Mercatoria* 226

⁵¹ Graffi (2011) *JL & Com* 283; Ch Pamboukis “The Concept and Function of Usages in the United Nations Convention on the International Sale of Goods” (2005) 25 *JL & Com* 107 126

⁵² ICC *INCOTERMS 2010*[®] 5 para 1

even if not expressly mentioned in a later transaction.⁵³ In the absence of express reference to the rules, courts and arbitral tribunals have applied INCOTERMS® on the basis of them being consistent with and representative of international trade practices and usages,⁵⁴ or in the context of trade usages as envisaged by article 9(1) of the United Nations Convention on Contracts for the International Sale of Goods⁵⁵ (“CISG”).⁵⁶ Where the parties clearly refer to them, INCOTERMS® apply as international trade usages which the parties have agreed to.⁵⁷ Scholars, however, disagree on whether INCOTERMS® can enjoy a form of autonomous application independent of express or tacit consent.⁵⁸

⁵³ In these instances they will function as an interpretative aid which provides information on the possible intention of the parties. See J Erauw “CISG Articles 66-70: The Risk of Loss and Passing It” (2005) 25 *JL & Com* 203 213; Z Valioti *Passing of Risk in International Sale Contracts: A Comparative Examination of the Rules on Risk under the United Nations Convention for the International Sale of Goods* (Vienna 1980) and INCOTERMS 2000 LLM thesis Kent (2003) Ch 1 para B *Pace University* <<http://www.cisg.law.pace.edu/cisg/biblio/valioti1.html>> (accessed 21-02-2012); F Dasser *Incoterms and the Lex Mercatoria: Applicability of Incoterms in the Absence of Express Party Consent* LLM thesis Harvard (1995) 76; J Basedow “The State’s Private Law and the Economy – Commercial Law as an Amalgam of Public and Private Rule-Making” (2008) 56 *Am J Comp L* 703 709; JO Honnold *Uniform Law for International Sales under the 1980 United Nations Convention* 4 ed (2009) para 114; German BGH 18 June 1975, VIII ZR 34/74 NW 917; OLG München, NJW 1957 426, AWD 1958 79; Higher Cantonal Court du Valais Switzerland (28 January 2009) *Pace University* <<http://cisgw3.law.pace.edu/cases/090128s1.html>> (accessed 17-02-2012)

⁵⁴ *Xiamen Trade v Lian Zhong* Xiamen Intermediate People’s Court China (5 September 1994) *Pace University* <<http://cisgw3.law.pace.edu/cases/940905c1.html>> (accessed 17-02-2012) and *UNILEX* <<http://www.unilex.info/case.cfm?pid=1&do=case&id=211&step=Abstract>> (accessed 17-02-2012); CIETAC Arbitration proceeding – *PVC suspension resin case* China (7 April 1999) *Pace University* <<http://cisgw3.law.pace.edu/cases/990407c1.html>> (accessed 17-02-2012); *Cherubino Valsangiacomo SA v American Juice Import Inc* Appellate Court Valencia Spain (7 June 2003) CLOUT case no 549 *Pace University* <<http://cisgw3.law.pace.edu/cases/030607s4.html>> (accessed 17-02-2012); Russian Federation Chamber of Commerce and Industry Arbitration Award no 406/1998 (6 June 2000) *Pace University* <<http://cisgw3.law.pace.edu/cases/000606r1.html>> (accessed 17-02-2012); Russian Federation Chamber of Commerce and Industry Arbitration Award no 62/1998 (30 December 1998) *Pace University* <<http://cisgw3.law.pace.edu/cases/981230r1.html>> (accessed 17-02-2012); Higher Cantonal Court du Valais Switzerland (28 January 2009) *Pace University* <<http://cisgw3.law.pace.edu/cases/090128s1.html>> (accessed 17-02-2012)

⁵⁵ United Nations Convention on Contracts for the International Sale of Goods (11 April 1980) UN Doc A/CONF 97/18 Annex 1 (1980)

⁵⁶ Presidium of Supreme Arbitration Court of the Russian Federation 25 December 1996: Information Letter 10 *Pace University* <<http://cisgw3.law.pace.edu/cases/961225r1.html>> (accessed 17-02-2012); ICC Arbitration case no 7645 of March 1995 – *Crude metal case* *Pace University* <<http://www.cisg.law.pace.edu/cisg/wais/db/cases2/957545i1.html>> (accessed 17-02-2012); *Arbatax SA* Reorganization Proceeding Commercial Court Buenos Aires Argentina (2 July 2003) *Pace University* <<http://cisgw3.law.pace.edu/cases/030702a1.html>> (accessed 17-02-2012); *Marc Rich & Co v Iritechna SpA* Appellate Court Geneva Italy (24 March 1995) *Pace University* <<http://cisgw3.law.pace.edu/cases/950324i3.html>> (accessed 17-02-2012) and *UNILEX* <<http://www.unilex.info/case.cfm?pid=1&do=case&id=198&step=Abstract>> (accessed 17-02-2012)

⁵⁷ J Erauw “Observations on the Passing of Risk” in F Ferrari; H Flechtner & RA Brand (eds) *The Draft UNCITRAL Digest and Beyond: Cases, Analysis and Unresolved Issues in the UN Sales Convention* (2004) 292 304; Pamboukis (2005) *JL & Com* 107 112; M Schmidt-Kessel “Article 9” in I Schwenzer (ed) *Schlechtriem & Schwenzer Commentary on the UN Convention on the International Sale of Goods (CISG)* 3 ed (2010) paras 1, 6; MJ Bonell “Article 9” in CM Bianca & MJ Bonell (eds) *Commentary on the International Sales Law: The 1980 Vienna Sales Convention* (1987) para 2 3; Honnold *Uniform Law* paras 114, 118

⁵⁸ Ramberg “CISG and INCOTERMS 2000” in *Sharing International Commercial Law across National Boundaries* 403; Schmidt-Kessel “Article 9” in *Schlechtriem & Schwenzer Commentary* paras 1, 12, 26; Gabriel (2001) *Vindobona Journal of International Commercial Law and Arbitration* 42-43; MG Bridge “The Transfer of Risk under the UN Sales Conventions 1980 (CISG)” in CB Andersen & UG Schroeter (eds) *Sharing International Commercial Law across National Boundaries: Festschrift for Albert H Kritzer on the Occasion of his Eightieth Birthday* (2008) 77 90

In cases where the CISG governs the contract, scholars⁵⁹ and courts have held that INCOTERMS[®] may function as an article 9(2) trade usage. Rulings by the Russian Tribunal of International Commercial Arbitration,⁶⁰ an Argentinean court,⁶¹ a Higher Cantonal Court in Switzerland,⁶² the Court of Appeals of Genoa,⁶³ American Federal District Courts⁶⁴ as well as the Federal Appellate Court of the USA support this view.⁶⁵ By virtue of article 9(2) of the CISG, the parties are considered to have impliedly made applicable to their contract usages which the parties knew or ought to have known and which are widely known in international trade and regularly observed in the particular trade concerned, unless the parties have agreed otherwise. A usage must be internationally known, at least in the particular trade to which it applies, and must be known and observed by the majority of those involved in the particular industry or trade.⁶⁶

Inasmuch as a usage must be “widely known” and “regularly observed”, it can be assumed to be part of the expectations of the parties. Hence, it can be argued that article 9(2)’s requirements are premised on the presumption of an implied intention.⁶⁷ However, where one or both of the parties to the

⁵⁹ P Perales Viscasillas “Comments on the Draft Digest relating to Articles 14-24, 66-70” in F Ferrari; H Flechtner & RA Brand (eds) *The Draft UNCITRAL Digest and Beyond: Cases, Analysis and Unresolved Issues in the UN Sales Convention* (2004) 259 290 Honnold *Uniform Law* para 118 lends qualified support to this notion on condition that they meet all the requirements of Art 9(2)

⁶⁰ Russian Federation Chamber of Commerce and Industry Arbitration Award no 406/1998 (6 June 2000) *Pace University* <<http://cisgw3.law.pace.edu/cases/000606r1.html>> (accessed 17-02-2012)

⁶¹ Juzgado Nacional de Primera Instancia en lo Comercial no 7 Argentina (20 May 1991) CLOUT case no 21 *UNILEX* <<http://www.unilex.info/case/cfm?pid=1&do=case&id=14&step=Abstract>> (accessed 17-02-2012) See *Arbatax SA Reorganization Proceeding Commercial Court Buenos Aires Argentina* (2 July 2003) *Pace University* <<http://cisgw3.law.pace.edu/cases/030702a1.html>> (accessed 17-02-2012)

⁶² Higher Cantonal Court du Valais Switzerland (28 January 2009) *Pace University* <<http://cisgw3.law.pace.edu/cases/090128s1.html>> (accessed 17-02-2012)

⁶³ *Marc Rich & Co v Iritechna SpA* Appellate Court Geneva Italy (24 March 1995) *Pace University* <<http://cisgw3.law.pace.edu/cases/950324i3.html>> (accessed 17-02-2012) and *UNILEX* <<http://www.unilex.info/case/cfm?pid=1&do=case&id=198&step=Abstract>> (accessed 17-02-2012)

⁶⁴ *St Paul Guardian Insurance Co v Neuromed Medical Systems & Support* 2002 WL 465312 (SD NY 2002) judgment aff’d 53 Fed Appx 173 (2d Cir 2002), 2002 US Dist LEXIS 5096 (SDNY March 26 2002) US Federal District Court New York (26 March 2002) CLOUT case no 447 *Pace University* <<http://cisgw3.law.pace.edu/cases/020326u1.html>> (accessed 17-02-2012); *China North Chemical Industries Corporation v Beston Chemical Corporation* WL 295396 (SD Tex 2006) US Federal District Court Texas (7 February 2006) *Pace University* <<http://cisgw3.law.pace.edu/cases/060207u1.html>> (accessed 17-02-2012)

⁶⁵ *BP Oil International v Empresa Estatal Petroleos De Ecuador* 332 F3d 333 (5th Cir 2003) 338, 200 ALR Fed 771 Federal Appellate Court [5th Circuit] United States (11 June 2003) CLOUT case no 575 *Pace University* <<http://cisgw3.law.pace.edu/cases/030611u1.html>> (accessed 17-02-2012) This ruling was made by an important American appellate court, the 5th circuit. This court covers the states of Texas and Louisiana, where the important trade centres Houston, Dallas and New Orleans are located

⁶⁶ Schmidt-Kessel “Article 9” in *Schlechtriem & Schwenzer Commentary* paras 16, 18. This does not mean that the usage should be an international usage. Domestic usages will suffice if they are internationally known and regularly observed in the trade concerned. See Bonell “Article 9” in *Bianca & Bonell Commentary* paras 2 2-2 2 3; Honnold *Uniform Law* para 120 1; Appellate Court Graz Austria – *Marble slabs case* (9 November 1995) CLOUT case no 175 *Pace University* <<http://cisgw3.law.pace.edu/cases/951109a3.html>> (accessed 17-02-2012); Supreme Court Austria – *Timber case* (15 October 1998) CLOUT case no 240 *Pace University* <<http://cisgw3.law.pace.edu/cases/981015a3.html>> (accessed 17-02-2012); Supreme Court Austria – *Wood case* (21 March 2000) CLOUT case no 425 *Pace University* <<http://cisgw3.law.pace.edu/cases/000321a3.html>> (accessed 17-02-2012)

⁶⁷ Pamboukis (2005) *JL & Com* 118-119; A Goldstajn “Usages of Trade and other Autonomous Rules of International Trade according to the UN (1980) Sales Convention” in P Sarcevic & P Volken (eds) *International Sale of Goods: Dubrovnik Lectures (1980)* (1986) 55 97; Honnold *Uniform Law* paras 119, 121

contract had no knowledge of the usage but ought to have known of it, the question is whether it is not the law itself, rather than the implied agreement of the parties, that confers binding force on the usage. Although it is a controversial issue, some scholars are of the view that article 9(2) grants a normative value to trade usages.⁶⁸ The ruling of one US court supports a normative approach insofar as it did not require actual or implied knowledge of the usage.⁶⁹ Even scholars who hold that trade usages can merely function as gap-fillers to supplement the intention of the parties where they have failed to make alternative arrangements, concede that in these circumstances legal effect is conferred on the objective expectations of the parties, and hence a hypothetical intent is upheld.⁷⁰

As regards INCOTERMS[®], the Federal Court of Appeal of the United States⁷¹ held that, even though the use of INCOTERMS[®] is not universal, they can be incorporated by virtue of article 9(2) CISG because they are well known in international trade. The court found support for its view in judgements delivered in France and Germany where the courts relied on INCOTERMS[®] as international trade usage or custom. A Swiss appellate court⁷² also stated that in the absence of agreement on their application “these rules may also be applicable under Art. 9(2) CISG, as their role as usages is widely recognized and regularly observed in international trade”.⁷³ They went so far as to conclude that “even when the Incoterms were not incorporated into the contract explicitly or implicitly, they are considered as rules of interpretation”.⁷⁴

Further support is found in the UNCITRAL Secretariat’s statement that INCOTERMS[®] are widely-observed usages for commercial terms, which will replace the provisions of the Convention where applicable.⁷⁵

Some commentators, however, are of the opinion that the requirements of wide recognition and regular observance might pose a problem for applying

⁶⁸ Pamboukis (2005) *JL & Com* 119; JO Albán “Remarks on the Manner in which the UNIDROIT Principles may be used to Interpret or Supplement CISG Article 9” *Pace University* para 4(a) <<http://cisgw3.law.pace.edu/cisg/text/anno-art-09.html>> (accessed 17-02-2012) See also Perales Viscasillas “Comments on the Draft Digest” in *The Draft UNCITRAL Digest and Beyond* 290

⁶⁹ *Geneva Pharmaceuticals Tech Corp v Barr Labs Inc* United States Federal District Court New York (10 May 2002) CLOUT case no 579 *Pace University* <<http://cisgw3.law.pace.edu/cases/020510u1.html>> (accessed 17-02-2012)

⁷⁰ Schmidt-Kessel “Article 9” in *Schlechtriem & Schwenzer Commentary* para 12 See also S Bainbridge “Trade Usage in International Sale of Goods: An Analysis of the 1964 and 1980 Sales Conventions” (1984) 24 *Va Jnl Int’l L* 619 659

⁷¹ *BP Oil International v Empresa Estatal Petroleos De Ecuador* 332 F3d 333 (5th Cir 2003) 338, 200 ALR Fed 771 Federal Appellate Court [5th Circuit] United States (11 June 2003) CLOUT case no 575 *Pace University* <<http://cisgw3.law.pace.edu/cases/030611u.html>> (accessed 17-02-2012)

⁷² Higher Cantonal Court du Valais Switzerland (28 January 2009) *Pace University* <<http://cisgw3.law.pace.edu/cases/090128s1.html>> (accessed 17-02-2012)

⁷³ Para I II 4(a)(aa)

⁷⁴ Para I II 4(a)(aa)

⁷⁵ *UN Report by the Secretary-General of the UN Commission on International Trade Law* UN Doc A/7618 (1969) paras 48-50, 57 The authors of the CISG had INCOTERMS[®] in mind when they decided to omit any reference to trade terms in the Convention

the INCOTERMS[®] rules on the basis of article 9(2).⁷⁶ According to them, the INCOTERMS[®] rules *in toto* are neither widely known nor recognised across all types of trade.⁷⁷

There are also scholars who argue that the FOB and CIF trade terms are applied differently in different countries and trades and do not always have the meaning as standardised by the ICC. Hence, INCOTERMS cannot apply automatically.⁷⁸ Moreover, a lack of consistent practice refutes the article 9(2) basis for the INCOTERMS[®] rules.

The revision of the INCOTERMS[®] rules may also have an effect on their status as mercantile custom and usage. The latest revision omits all references to the ship's rail as the dividing point for costs and risks under the FOB, CIF and CFR rules. Although this change is in line with modern trade practices and addresses the arbitrary nature of the ship's rail, it raises other questions. What is the effect of such a change on the legal nature of INCOTERMS[®] as an expression of mercantile customs and usages, seeing that the ship's rail has been the figurative border between the seller and buyer's countries for centuries? Does that mean that the seller now has any additional obligations as regards securing the goods on deck or in a hold (the so-called stowing and trimming obligations)? Traditionally, these obligations are regulated by means of the FOBT ("free on board and trimmed" and FOBST "free on board, stowed and trimmed") terms. However, trade term variations have never been, and still are not, covered by the INCOTERMS[®] rules.⁷⁹ Moreover, the delivery point has now been moved to where and when the goods are placed on board the vessel, and with it the point where risk and costs transfer to the buyer. Does the FOB and CIF INCOTERMS[®] 2010 rule still reflect well-established custom and usage to the extent that they can qualify as established trade usage under article 9(2) of the CISG? Or is this change simply a reflection of current mercantile practice aimed at commercial efficiency, which has not yet matured into usage or custom?

The same question can be asked in the context of the CIF term. Here the seller is not only required to ship the goods at his own expense, but also to arrange and pay for insurance on the goods until they reach the port of destination. However, in terms of the CIF INCOTERMS[®] rule, the seller has to provide for a minimum insurance cover of 110% of the price of the goods. The additional 10% is said to cover the minimum resale profit anticipated by the buyer.⁸⁰ Is this a custom or trade usage, or simply a reflection of the most

⁷⁶ Schmidt-Kessel "Article 9" in *Schlechtriem & Schwenzer Commentary* para 26. See, however, *Geneva Pharmaceuticals Tech Corp v Barr Labs Inc* US Federal District Court New York (10 May 2002) *Pace University* <<http://cisgw3.law.edu/cases/020510u1.html>> (accessed 17-02-2012) where the court applied trade usage automatically without proof of any additional requirements.

⁷⁷ Erauw "Observations on Passing of Risk" in *The Draft UNCITRAL Digest and Beyond* 303; Honnold *Uniform Law* para 118.

⁷⁸ F Ferrari "Trade Usage and Practices Established between the Parties under the CISG" (2003) 5 *Int'l Bus LJ* 571-576; Graffi (2011) *JL & Com* 285.

⁷⁹ ICC *INCOTERMS 2010*[®] 10.

⁸⁰ Ramberg *Guide to Incoterms 2000* 121; Russian Federation Chamber of Commerce and Industry Arbitration Award no 406/1998 (6 June 2000) *Pace University* <<http://cisgw3.law.edu/cases/000606r1.html>> (accessed 17-02-2012).

dominant commercial practice and hence an attempt to facilitate international trade?⁸¹

Despite many reservations, most scholars agree that the older and more established trade terms, such as FOB and CIF, qualify as article 9(2) trade usages.⁸² They are widely known and respected and may have acquired the status of autonomous international trade custom.⁸³ They argue that the majority of cases where it was held that INCOTERMS® amount to an article 9(2) trade usage dealt with the best known and frequently-used trade terms such as FOB and CIF and not with less known trade terms such as the D-terms or EXW, which makes the interpretative results for those cases uncertain.⁸⁴ It is also argued that the more recent, or modern, INCOTERMS® are not derived from international trade usage, but that the ICC created them,⁸⁵ which will impinge on their legal nature as international trade usage.

Although it is true that most of the cases that support the autonomous character of INCOTERMS® dealt with CIF and FOB, those rulings concluded that INCOTERMS® *in toto* amount to an article 9(2) usage. As regards the opinion that INCOTERMS® are not widely known across all trades, it can be argued that article 9(2) merely requires regular observance “in the particular trade concerned” and not necessarily universal or global recognition.⁸⁶ If it is customary in a particular trade to refer to INCOTERMS® as a whole, the codification as such will be implied by law.⁸⁷ Basedow is of the opinion that INCOTERMS® were originally aimed at reconciling divergent international understandings of trade terms by means of a deliberate international compromise. However, through continuous use, they have over the course of one or two generations gradually transformed into commercial custom. Hence, it is now customary to define or interpret trade terms with reference to INCOTERMS® *in toto*.⁸⁸

⁸¹ Graffi (2011) *JL & Com* 285-287

⁸² Perales Viscasillas “Comments on the Draft Digest” in *The Draft UNCITRAL Digest and Beyond* 290; Basedow (2008) *Am J Comp L* 709 See, however, JA Spanogle “Incoterms and the UCC Article 2 – Conflicts and Confusions” (1997) 31 *Int’l L* 111 113, who seems to accept their status as international trade usage without distinguishing between the well-established terms and the more modern INCOTERMS®

⁸³ MC Rowe “The Contribution of the ICC to the Development of International Trade Law” in N Horn & CM Schmitthoff (eds) *The Transnational Law of International Commercial Transactions II* (1982) 51 53 Note should, however, be taken that these comments were made in the context of the previous editions of INCOTERMS® where the ship’s rail was kept intact as dividing point for costs and risks

⁸⁴ Perales Viscasillas “Comments on the Draft Digest” in *The Draft UNCITRAL Digest and Beyond* 291; Rowe “The Contribution of the ICC” in *Transnational Law II* 53; H de Vries “The Passing of Risk in International Sales under the Vienna Sales Convention 1980 as compared with Traditional Trade Terms” (1982) 17 *Eur Trans L* 495 497 n 37

⁸⁵ F de Ly *International Business Law and Lex Mercatoria* (1992) 174-175 See also in this regard the discussion below in part 3 2

⁸⁶ Schmidt-Kessel “Article 9” in *Schlechtriem & Schwenzer Commentary* paras 16

⁸⁷ MG Bridge *The International Sale of Goods: Law and Practice* (1999) 69-70 contends that this is the reason why INCOTERMS® apply automatically in the oil trade, even in the absence of express agreement, while in the case of dry cargo they only apply if expressly agreed on

⁸⁸ Basedow (2008) *Am J Comp L* 709-710

3.2 The ICC's revision methodology

Because INCOTERMS® are “an expression of international commercial practice” a revision is only warranted when “something important has taken place in commercial practice”.⁸⁹ This philosophy is reflected in the ICC's revision methodology. It entails a process of consultation and research to determine what the current shipping and delivery practices are, and then to find a common denominator in the form of the most consistent commercial practice.⁹⁰

The aim of the ICC is not to anticipate commercial practice but to ascertain and consolidate current practice.⁹¹ The objective is therefore not to find any ideal solutions and then to recommend them to users, but to standardise the most dominant practice at a given point in time.⁹² According to Ramberg, it is consistent with the traditional revision methodology to assess usages in the light of changed mercantile practices in cargo handling, transportation techniques, documentation and communication methods and then to inform merchants about their shortcomings. However, it becomes more complicated when the ICC has to decide whether it should design or formulate a new trade term which does not yet exist in the marketplace in order to adapt to the changes in mercantile practice.⁹³

The FCA INCOTERMS® rule, which was introduced by the ICC in 1980,⁹⁴ is an example where the ICC formulated a new rule after they had taken note of a commercial practice which evolved in regard to goods transported by multimodal and containerised transportation methods.⁹⁵ The use of these new transportation methods necessitated the introduction of a term which was more appropriate to the division of costs and risks than the traditional FOB and CIF terms. A similar situation gave rise to the introduction of the DAT and DAP rules in the 2010 revision.⁹⁶ Even though there is still no universal usage or custom applicable to the unloading of goods from the arriving means of transport, these terms reflect the most common practices followed today.

⁸⁹ Ramberg (2010) *Penn St Int'l L Rev* 415

⁹⁰ Schmitthoff (1968) *Int'l Comp LQ* 565-566 identifies two methods of comparative law which can be used to develop uniform trade law, namely that of consolidation and codification. INCOTERMS® are the product of the consolidation method which is aimed at ascertaining the common core of various legal regulations. In the context of standard contracts the core is sometimes expressed in an entirely new rule. Schmitthoff describes this new rule as “synthetic law” based on a mere factual, opposed to a normative or doctrinal, ascertainment.

⁹¹ PK Irani “INCOTERMS and Other Conditions of Sale” in L Rao Penna & H Peng Kee (eds) *Current Developments in International Transfers of Goods and Services* (1994) 138-142.

⁹² *Introduction to the ICC Incoterms 1953* 5; Schmitthoff (1968) *Int'l Comp LQ* 558.

⁹³ Ramberg (2010) *Penn St Int'l L Rev* 419-420. It is a well-known fact that customs and usages develop very slowly; partly because of the requirements that a practice should be widely (internationally) known and regularly followed in a particular trade or geographical area. Merchants tend to stick to old habits, as is proven by the continued use of FOB and CIF in situations of containerised transportation. Although consistent commercial practices which improve and facilitate international trade may have developed, it does not mean that they meet the requirements of usage or custom yet, or that merchants have already formulated a trade term to that effect.

⁹⁴ At that time it was known as “FRC” (“free carrier”).

⁹⁵ Ramberg (2010) *Penn St Int'l L Rev* 422.

⁹⁶ And for that matter, all the delivered terms (D-terms) contained in previous editions of INCOTERMS®.

It has been argued that the abovementioned terms (or rules) do not function as trade usage or custom *per se* but as standard contract terms formulated by an international organisation.⁹⁷ Although this may be true, these standard terms are based on the most dominant commercial practice that exists at a given point in time, and to that extent the revision methodology does not deviate from the original aims of the ICC, namely to standardise consistent practice and promote uniformity.

The introduction of new obligations to bring the rules in line with international cargo security regulations as well as amendments introduced to align the rules with the 2009 Cargo Institute Clauses and the new Rotterdam Rules⁹⁸ are not mere theoretical or desired improvements introduced by the ICC. They reflect current trade practices and, hence, the INCOTERMS® rules keep pace with international developments, without compromising the ICC's traditional aims.

According to Ramberg, the reason for the 2010 revision was not so much uncertainty on the contents of a particular rule, but lack of clarity on how such rule is to be used in practice.⁹⁹ In the twenty first century the main concern is that the rules are not always applied in the most appropriate contexts. This change in focus is evident from the new subtitle, namely "rules for the use of domestic and international trade terms". Moreover, the Introduction to INCOTERMS® 2010 addresses the use of the rules prior to discussing their main features. Although this edition introduces a new focus it is still consistent with the traditional methodology of the ICC, namely to promote uniformity and legal certainty.

Ramberg, however, criticises the ICC's decision to register a trademark over the rules. According to him, this step derogates the whole of INCOTERMS® to nothing more than standard contract terms. It is his opinion that by protecting its intellectual property rights the ICC implies that the whole of the so-called "collective work" is the result of their own intellectual efforts. Hence, they do not recognise that the rules represent international usage or custom and, at the most, are a refinement of the *lex mercatoria*.¹⁰⁰ Concern is furthermore expressed about the fact that the accompanying "Copyright notice and synopsis of trademark usage rules"¹⁰¹ makes reference to the ICC's "collective work" and "terms devised by ICC".¹⁰² It is said that the appropriation of the rules to a particular organisation adds to the decline of INCOTERMS® as an expression and refinement of international commercial custom and derogates them to terms created by the ICC. Moreover, according to him, UNCITRAL endorsed the use of the INCOTERMS® rules on the basis that the rules reflect international trade usage and custom, and hence can supersede the CISG's general provisions on delivery and the passing of risk. It is his contention that

⁹⁷ Ramberg (2010) *Penn St Int'l L Rev* 422-423

⁹⁸ United Nations *Convention on Contracts for the International Carriage of Goods, Wholly or Partly by Sea* (2009) A/RES/63/122

⁹⁹ ICC *Guide to Incoterms® 2010* 9

¹⁰⁰ Ramberg (2010) *Penn St Int'l L Rev* 423

¹⁰¹ ICC *INCOTERMS® 2010* 125

¹⁰² 125

the Convention's default rules on delivery and risk should not be monopolised by a particular organisation, but should continue to function as an expression and refinement of international customs and practices.¹⁰³

These observations need to be placed into context. INCOTERMS® are standardised rules which reflect the most dominant commercial customs and practices applied in a wide range of trades across various countries and legal systems.¹⁰⁴ The ICC identifies the most dominant and consistent practices and then standardises them in the form of the INCOTERMS® rules. Despite the fact that they have their roots in commercial practices and usages, the rules mainly apply as standard contract terms based on agreement. Although a number of courts have held that INCOTERMS® can apply automatically as international trade usage, it still remains a controversial issue, especially in the context of the less well-known trade terms. It has always been the ICC's stance that the INCOTERMS® rules should be incorporated into the contract of sale, and the new revision has not brought any change in this regard.¹⁰⁵ As for the argument that INCOTERMS® are to a large extent a creation of the ICC, it has to be kept in mind that commercial practice evolves constantly and that the ICC has to recognise such developments. Sometimes it necessitates the formulation of new terms to reflect these practices. However, when they elect to formulate new trade terms, the drafters never anticipate commercial custom or simply formulate an ideal solution. Even where a new rule does not qualify as international commercial custom or usage yet, it is still a reflection of the most dominant commercial practice which applies internationally, and to that extent the traditional methodology has not changed.

In determining the legal nature and character of INCOTERMS® one should not be concerned with whether each and every INCOTERMS® rule qualifies as an international trade usage, but rather whether INCOTERMS® as a compilation qualifies as a trade usage in a particular trade. The more INCOTERMS® *in toto* are recognised and applied, the greater the chance that they will be acknowledged as international trade usage or custom.¹⁰⁶ It is unlikely that the registration of a trademark will change that. Previous editions already appropriated the rules to the organisation by referring to them as the "ICC official rules" and this had little effect on their legal nature and status.¹⁰⁷

¹⁰³ Ramberg (2010) *Penn St Int'l L Rev* 424

¹⁰⁴ So-called horizontal standardisation See Schmitthoff (1968) *Int'l Comp LQ* 556

¹⁰⁵ ICC *INCOTERMS 2010*® 5 para 1

¹⁰⁶ F Eisemann "Incoterms and the British Export Trade" (1965) *JBL* 114 121-122; Dasser *INCOTERMS and the Lex Mercatoria* 71 According to Schmitthoff *International Trade Usages* 52-57, 62, INCOTERMS® are used extensively in international trade and ultimately practical observance of trade usage will decide their legal character See also JH Dalhuisen "Custom and its Revival in Transnational Private Law" (2008) 18 *Duke J Comp & Int'l L* 339 356; Basedow (2008) *Am J Comp L* 709-710

¹⁰⁷ Cf Schmitthoff "The Law of International Trade" in *Clive M Schmitthoff's Select Essays* 224, who contends that commercial practices, usages or standards can only operate as one of the sources of the law of international trade once they have been formulated by international agencies such as the ICC

What should perhaps be of more concern is that traders, and even scholars,¹⁰⁸ refer to INCOTERMS® in contexts where there is no mention of the ICC's rules. Although the registration of a trademark is in the first place a business decision aimed at protecting the ICC's interests, it could be an effective way of settling the terminology issue once and for all.

4 Conclusion

If the INCOTERMS® rules are used in accordance with the ICC's prescription, namely as express contractual terms, the question as to the legal nature of the rules will be nothing more than academic since they will then apply by virtue of the parties' agreement. Only in the absence of express agreement the question arises as to whether the rules are capable of having an autonomous existence. Although international commercial customs and practices have originally been the basis for INCOTERMS®, opinions differ as to whether the rules amount to an international usage. A number of courts have, however, held that INCOTERMS® are an internationally well-known and regularly applied standard and hence that they will function as a trade usage; alternatively that they can be used as rules of interpretation.

Since the inception of INCOTERMS® in 1936, the ICC has adapted its original focus from rules purely aimed at standardisation and unification to rules that are geared for the challenges of modern day business and transportation methods. Trade term definitions have been refined, and when needed terms were added in an attempt to keep up with current international commercial practice. Despite these changes, the ICC remains true to its traditional methodology and only reacts to developments in international commercial practice by formulating the most dominant and consistent practices.

The discussion has shown that the legal nature of INCOTERMS® is quite complex. It is not simply a question of them being either mercantile custom or standard contract terms. Primarily they function as standard contract terms. However, they also have their roots in mercantile custom, and numerous revisions later, they still reflect the most dominant and consistent commercial practices identified in international trade. This article suggests that the best approach for determining the legal nature and character of INCOTERMS® would be to consider the rules as a whole, and not to evaluate individual trade term rules in isolation. Rules which are based on consistent business practice may gradually acquire the force of international usage or custom if they are regularly observed over a long period of time in a certain sphere of trade. Therefore, the more commonly INCOTERMS® are used in a specific trade or region, the greater the possibility that they are to be followed as trade usage or mercantile custom which is binding on the parties, even if they do not have any knowledge of them.

¹⁰⁸ See for example P Ndlovu "Incoterms 2010: A Consideration of Certain Implications of the Amendments to the Traditional Incoterms 2000" (2011) 45 *CILSA* 204 211, who incorrectly refers to INCOTERMS® in the context of the national definitions of the American UCC

SUMMARY

INCOTERMS® reflect the most dominant and consistent commercial customs and practices evident in international commerce. They are regularly updated to keep them in line with changing mercantile practice. However, over the years, several terms were added to represent practices which have not yet developed into mercantile usage or custom. In reaction to the latest revision of the INCOTERMS® rules, which has come into operation on 1 January 2011, one commentator concludes that INCOTERMS® now function as standard contract terms and no longer as mercantile custom or usage. This article addresses the legal nature of INCOTERMS®, with specific reference to the International Chamber of Commerce's ("ICC") revision methodology. In principle, INCOTERMS® function as contract terms. Whether they enjoy an autonomous existence apart from party agreement is a question that has not yet been answered conclusively. There is evidence that courts apply them as international trade usage or custom, especially in the context of article 9 of the United Nations Convention on Contracts for the International Sale of Goods ("CISG"). Scholars, however, disagree on whether INCOTERMS® *in toto* can function as international trade usage, especially when it comes to recently introduced rules. It is submitted that individual rules should not be evaluated in isolation, but that their legal nature should be determined with reference to the compilation as a whole. It is concluded that the more INCOTERMS® are used in a particular trade, they will become known and observed in that trade. In due course they will acquire the force of mercantile usage or custom which can apply independent of party agreement.